



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 26, 2011

VIA FIRST CLASS MAIL AND FACSIMILE

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RE: MUR 6451
MoveOn.org and Wes Boyd, in
his official capacity as treasurer

Dear Mr. Sandler:

On August 7, 2009, we notified your clients, MoveOn.org and Wes Boyd, in his official capacity as treasurer, (the "Committee") that it had been referred to the Office of General Counsel for its apparent failure to file four 48-Hour Notices of twelve independent expenditures totaling \$557,082.36 and two 24-Hour Notices of independent expenditures totaling \$158,393.02, in accordance with 2 U.S.C. § 434(g). On January 19, 2011, the Commission found reason to believe that your clients violated 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(b) and (c), provisions of the Act and the Commission's regulations. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

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We look forward to your response.

On behalf of the Commission,


Cynthia L. Bauerly
Chair

Enclosures
Factual and Legal Analysis
Conciliation Agreement

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: MoveOn.org and Wes Boyd, MUR: 6451
in his official capacity as treasurer

I. BACKGROUND

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. See 2 U.S.C. § 437g(a)(2). The Reports Analysis Division ("RAD") referred MoveOn.org and Wes Boyd, in his official capacity as treasurer, (the "Committee" or "Respondents") to the Office of General Counsel for failing to file four 48-Hour Notices of independent expenditures totaling \$557,082.36 and for failing to file two 24-Hour Notices of independent expenditures totaling \$158,393.02.

On August 7, 2009, this Office notified the Respondents of the referral in accordance with the Commission's policy regarding notification in non-complaint generated matters. 74 Fed.Reg. 38617 (August 4, 2009). In its response to the notification, received by the Commission on August 31, 2009, the Committee requests that the Commission take no further action as to the Committee's failure to file the notices in question, or, in the alternative, refer the matter to the Commission's Alternative Dispute Resolution Office. The Committee claims that the reports were timely prepared utilizing the Commission's FECFILE software. However, it claims that three of the 48-Hour Notices in question did not upload to the Commission, and that the fourth 48-Hour Notice uploaded, but for unknown reasons, contained data from a previously filed 48-Hour Notice. The Committee did not specifically address its failure to file the two 24-Hour Notices. The Committee does claim that the failure to properly file the reports was

1 inadvertent, and may have been caused by either human or computer error. Finally, the
2 Committee states that it is taking steps to verify that future notices will be successfully
3 filed with the Commission.

4 As discussed below, it does not appear that the failures to file the notices resulted
5 from problems with the Commission's software, and were instead the result of the
6 Committee's errors. Accordingly, the Commission found reason to believe that the
7 Committee violated 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(b) and (c), and authorized
8 pre-probable cause conciliation with the Committee.

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 An independent expenditure is an expenditure that expressly advocates the
11 election or defeat of a clearly identified Federal candidate and that is not made in concert
12 or cooperation with, or at the request or suggestion of, the candidate or his or her
13 committee or agent. 2 U.S.C. § 431(17).

14 A political committee that makes or contracts to make independent expenditures
15 aggregating \$10,000 or more with respect to a given election at any time during a
16 calendar year up to and including the 20th day before the date of an election shall file a
17 report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2); 11 C.F.R.
18 § 104.4(b)(2). The reports, known as 48-Hour Notices, must be filed by the end of the
19 second day "following the date on which a communication that constitutes an
20 independent expenditure is publicly distributed or otherwise publicly disseminated."
21 11 C.F.R. § 104.4(b)(2). The Committee shall file additional reports within 48 hours
22 after each time it makes or contracts to make independent expenditures aggregating an
23 additional \$10,000. *Id.*

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1 In addition, a political committee that makes or contracts to make independent
2 expenditures aggregating \$1,000 or more with respect to a given election after the 20th
3 day, but more than 24 hours before the date of an election, shall file a report describing
4 the expenditures within 24 hours. 2 U.S.C. § 434(g)(1); 11 C.F.R. § 104.4(c). The
5 reports, known as 24-Hour Notices, must be filed within 24 hours "following the date on
6 which a communication that constitutes an independent expenditure is publicly
7 distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(c). The Committee
8 shall file additional reports within 24 hours after each time it makes or contracts to make
9 independent expenditures aggregating an additional \$1,000. *Id.*

10 **A. 48-Hour Notices**

11 On October 13, 2008, the Committee filed its 2008 October Quarterly Report,
12 which included a Schedule E disclosing 87 independent expenditures totaling \$4,091,644
13 in support of or opposition to Federal candidates in the 2008 general election. However,
14 the Committee failed to file four 48-Hour Notices for 12 of the independent expenditures
15 totaling \$557,082.36. *See* RAD Referral, Attachment 2.

16 On November 19, 2008, RAD sent a Request for Additional Information
17 ("RFAI") to the Committee referencing the 2008 October Quarterly Report and the
18 Committee's failure to file the required 48-Hour Notices of independent expenditures.
19 On December 19, 2008, the Committee's assistant treasurer contacted RAD and stated
20 that after he received the RFAI, he reviewed the Committee's data file and realized the
21 notices had been prepared but had not been filed. Referral at 2. He acknowledged that
22 the Committee had not received confirmation receipts for the notices. *Id.* The
23 Committee then filed a Miscellaneous Electronic Submission stating that it had "prepared

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1 and closed these reports in its software” and believed that the reports were properly filed
2 utilizing the Commission’s FECFILE software. Referral at 3. The Committee provided a
3 copy of its electronic file to demonstrate that the assistant treasurer had prepared the
4 notices. *Id.*

5 In its response to the referral notification, the Committee again maintains that the
6 notices were timely prepared using the Commission’s software. In addition, the
7 Committee suggests that it is possible that the notices were not filed because of either
8 human or computer error. Response at 3. The Committee also claims that one of the 48-
9 Hour Notices of independent expenditures totaling \$219,651.76 was prepared and filed,
10 but that for unknown reasons, the report contained data from a 48-Hour Notice originally
11 filed in May 2008. *Id.* The Committee suggests that the Commission’s software may
12 have substituted the previously submitted data for the data entered by the Committee. *Id.*

13 **B. 24-Hour Notices**

14 On December 2, 2008, the Committee filed its 2008 30-day Post-General report,
15 which included a Schedule E disclosing 41 independent expenditures totaling
16 \$502,794.34 in support of or opposition to Federal candidates in the 2008 general
17 election. However, the Committee failed to file two 24-Hour Notices for eight
18 independent expenditures totaling \$158,393.02. See RAD Referral, Attachment 3.

19 On February 20, 2009, RAD sent an RFAI to the Committee referencing the 30-
20 Day Post-General report and the Committee’s failure to file required 24-Hour Notices of
21 independent expenditures.¹ On February 26, 2009, the Committee filed a Miscellaneous

¹ The RFAI actually identified nine independent expenditures totaling \$187,915.32 for which 24-Hour Notices had not been filed. The Committee explained to RAD that one of the questioned independent expenditures totaling \$29,522.30 was a residual payment for an estimated expenditure that was previously disclosed. Therefore, RAD did not include the expenditure in the referral.

1 Electronic Submission in response to the RFAI and acknowledged that it had failed to file
2 two 24-Hour Notices for the eight independent expenditures disclosed on the 2008 30-
3 day Post-General report. The Submission stated that the Committee did not realize that
4 the notices had not been filed until it received the RFAI. Again, the Committee provided
5 its data file to demonstrate that one of the notices was prepared for filing, but had not
6 been filed. In its response to the referral notification, the Committee acknowledges that it
7 omitted a disbursement for \$5,000 made to Hotjob.com in one of the prepared 24-Hour
8 Notices. However, it did not specifically address its failure to file the 24-Hour Notices.
9 Instead, as previously noted, it generally referenced either human or computer error
10 related to its failure to file the notices.

11 **C. Analysis**

12 The Committee is responsible for assuring that notices are filed, not merely
13 prepared. See 2 U.S.C. § 434(g)(1)(2) (a committee making an independent expenditure
14 "shall file" a report describing the expenditure) (emphasis added). The Committee
15 violated the Act when it failed to file four 48-Hour Notices of independent expenditures
16 totaling \$557,082.36 and when it failed to file two 24-Hour Notices of independent
17 expenditures totaling \$158,393.02.

18 In its response, the Committee states that the failure to file the notices was
19 inadvertent and that each specific failure may have been the result of either human or
20 computer error. Response at 3. Portions of the response appear to acknowledge that the
21 Committee's assistant treasurer simply made mistakes during the filing process ("failure
22 to properly upload these four reports was inadvertent and possibly caused by technical
23 problems in using the Commission's software") (emphasis added), but elsewhere in the

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1 response, the Respondents appear to allege problems with the FEC intake process (i.e.
2 "the FEC software submitted data from an earlier 48-hour filing from May 2008 rather
3 than the data prepared for the September 10th filing" and "although it appears that the
4 four reports were timely prepared and queued for filing, it appears as though three reports
5 did not successfully upload with your office"). Response at 2-4.

6 If the filing failure resulted from human error by the Committee's staff, this error
7 would not excuse the violation. Further, it does not appear that Commission computer
8 issues prevented the Committee from timely filing the required 48-Hour and 24-Hour
9 Notices, or that an FEC software failure caused the Committee to incorrectly file a
10 previously-filed notice. Instead, for the following reasons, it appears that the Committee
11 simply failed to file the required notices, and in the case of the previously-filed notice,
12 filed the wrong report in error.

13 First, MoveOn.org is a very experienced political committee with a long history
14 of filing these types of reports. MoveOn.org registered with the Commission in 1999 and
15 has filed disclosure reports with the Commission for almost 11 years. In the Committee's
16 response to the referral notification, the assistant treasurer claims over 20 years
17 experience in filing Commission reports, which would include work on behalf of this
18 Committee and for other political committees. Response at 2. Further, during the
19 election cycle in question, the Committee successfully filed over fifty 48-Hour and 24-
20 Hour Notices, and for each of the notices, the Committee received a confirmation receipt
21 indicating successful filing.

22 In addition, there is no information suggesting that MoveOn.org experienced
23 filing difficulties that would have prompted the Committee to contact the Commission

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1 seeking assistance to resolve those difficulties. In fact, according to the Commission's
2 Electronic Filing Office, which keeps detailed logs of all requests for technical support,
3 the Committee's assistant treasurer contacts the Commission regularly, and on July 15,
4 2008, before MoveOn.org's required notices were due, the assistant treasurer contacted
5 the Commission regarding an unrelated report for a different committee because he had
6 not received confirmation that the report was filed. However, the Commission received
7 no notice from the Respondents that they were having difficulty filing the notices in
8 question in this matter, or that the Committee had not received confirmations for required
9 notices that it believed had been filed. In addition, the Electronic Filing Office received
10 no reports of difficulty with filing reports or notices from any committee at the time that
11 the Respondents were required to file the notices.

12 With regard to the 48-Hour Notice that Respondents claim was filed with
13 incorrect information, the Electronic Filing Office indicates that the software would not
14 have substituted incorrect or outdated information into the form. Each time a political
15 committee determines that it is appropriate to file a notice or report, the filer accesses a
16 form on the FECFILE software. That form is empty until the filer inputs the information.
17 The filer prepares the required notice or report and saves it to the committee's database.
18 When it is time to electronically file, the filer accesses the report or notice and uploads it
19 to the Commission. Given these facts, it is likely that the assistant treasurer in this matter
20 accessed and uploaded the wrong report.

21 Finally, during conversations with RAD in responses to the RFAs, the
22 Committee acknowledged that although it prepared the notices, they were not filed with
23 the Commission. Referral at 2. None of the submissions made in response to the RFAs

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1 alleges an agency computer error. While the Committee's response to the referral
2 notification questions whether the failure was due to human or possibly computer error, it
3 is reasonable to expect that the Respondents would have explicitly raised any such issues
4 at the time they were first advised of the missing reports.

5 Because the Committee failed to file the notices with the Commission, the
6 Commission found reason to believe that MoveOn.org and Wes Boyd, in his official
7 capacity as treasurer, violated 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(b) and (c).

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